

§ 904.244 Production of documents and inspection.

(a) *Scope.* If ordered by the Judge, any party may serve on any other party a request to produce a copy of any document or specifically designated category of documents, or to inspect, copy, photograph, or test any such document or tangible thing in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request must set forth:

(1) The items to be produced or inspected by item or by category, described with reasonable particularity, and

(2) A reasonable time, place, and manner for inspection. The party upon whom the request is served must serve within 20 days a response or objections, which must address each item or category and include copies of the requested documents.

§ 904.245 Subpoenas.

(a) *In general.* Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence for the purpose of discovery or hearing may be issued as authorized by the statute under which the proceeding is conducted.

(b) *Timing.* Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition.

(c) *Motions to quash.* Any person to whom a subpoena is directed or any party may move to quash or limit the subpoena within 10 days of its service or on or before the time specified for compliance, whichever is shorter. The Judge may quash or modify the subpoena.

(d) *Enforcement.* In case of disobedience to a subpoena, NOAA may request the Justice Department to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

HEARINGS

§ 904.250 Notice of time and place of hearing.

(a) The Judge will promptly serve on the parties notice of the time and place

of hearing. The hearing will not, except in extraordinary circumstances, be held less than 20 days after service of the notice of hearing.

(b) In setting a place for hearing, the Judge will consider the convenience and costs of the parties, including but not limited to transportation costs and living expenses of witnesses, attorneys, and the Judge; place of residence of the respondent(s); scheduling of other hearings within the same region; and availability of facilities and court reporters.

(c) Upon the consent of each party to the proceeding, the Judge may order that all or part of a proceeding be heard on submissions or affidavits if it appears that substantially all important issues may be resolved by means of written materials and that efficient disposition of the proceeding can be made without an in-person hearing. For good cause, the Judge may, in his sole discretion, order that the testimony of witnesses be taken by telephone.

[52 FR 10325, Mar. 31, 1987, as amended at 61 FR 54731, Oct. 22, 1996]

§ 904.251 Evidence.

(a) At the hearing, every party has the right to present oral or documentary evidence in support of its case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph may not be interpreted to diminish the powers and duties of the Judge under this subpart.

(b) All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the proceedings, and hearsay evidence is not inadmissible as such.

(c) Formal exceptions to the rulings of the Judge are unnecessary. It is sufficient that a party, at the time of the ruling, makes known the action that it desires the Judge to take or its objection to an action taken, and the grounds therefor. Rulings on each objection must appear in the record.

(d) In any case involving a charged violation of law in which the party charged has admitted an allegation,

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evidence may be taken to establish matters of aggravation or mitigation.

(e) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

(f) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

§ 904.252 Witnesses.

(a) Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(b) Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony.

(c) Witnesses other than NOAA employees subpoenaed under these rules, including § 904.245, will be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken are entitled to the same fees as are paid for like services in the courts of the United States. Fees and any other related expenses for NOAA employees as authorized by the NOAA travel handbook will be paid by the party at whose instance the witness appears or the deposition is taken.

(d) If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter must be court certified under 28 U.S.C. 1827.

§ 904.253 Interlocutory appeals.

(a) At the request of a party or on the Judge's own initiative, the Judge may certify to the Administrator for review

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a ruling that does not finally dispose of the proceeding, if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(b) Upon certification by the Judge of the interlocutory ruling for review, the parties have 10 days to serve any briefs associated with the certification. The Administrator will promptly decide the matter.

(c) No interlocutory appeal lies as to any ruling not certified by the Judge.

§ 904.254 Ex parte communications.

(a) Except to the extent required for disposition of ex parte matters as authorized by law, after issuance of a NOVA, NOPS, or NIDP and until the final decision of the Agency is effective under these regulations, no ex parte communication relevant to the merits of the proceeding may be made, or knowingly caused to be made:

(1) By the Judge or by an Agency employee involved in the decisional process of the proceeding to any interested person outside the Department of Commerce or to any Agency employee involved in the investigation or prosecution of the case;

(2) By any Agency employee involved in the investigation or prosecution of the case to the Judge or to any Agency employee involved in the decisional process of the proceeding; or

(3) By an interested person outside the Department of Commerce to the Judge or to any Agency employee involved in the decisional process of the proceeding.

(b) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge or Administrator, as appropriate, may take action consistent with these rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(c) Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a